83 - 1562

No.

IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 1983

RICHARD JOSEPH BURG, Appellant

vs.

MUNICIPAL COURT FOR THE SANTA CLARA JUDICIAL DISTRICT OF SANTA CLARA COUNTY; THE PEOPLE OF THE STATE OF CALIFORNIA, Real Party in Interest, Appellee

On Appeal From
The Supreme Court
of the State of California

Jurisdictional Statement

Perry E. Olsen
Counsel for Appellant
406 Main Street, Suite 224
Watsonville, CA 95076
(408) 722-2763

QUESTIONS PRESENTED

The question presented by this appeal is whether California Vehicle Code § 23152(b) is a valid statute, or whether it is invalid as an impermissible infringement upon the rights of persons driving in the State of California which rights are given by the due process and equal protection clauses of the United States Constitution.*

---

*California Vehicle Code § 23152(b) provides:

> "It is unlawful for any person who has 0.10 percent or more, by weight, of alcohol in his or her blood to drive a vehicle upon a highway or upon other than a highway in areas which are open to the general public.
>
> "For purposes of this subdivision, percent, by weight, of alcohol shall be based upon grams of alcohol per 100 milliliters of blood."

PARTIES TO PROCEEDING BELOW

All parties to the proceedings in the lower courts appear in the caption in this case in the United States Supreme Court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

CONSTITUTION

TEXTS

OPINIONS BELOW

An opinion was rendered in this matter by the California Supreme Court and may be found at Burg v. Municipal Court, 35 C.3d 257, ___ C.R. ___, ___ P.2d ___ (1983).* The Court of Appeal of the State of California rendered an opinion in this matter which may be found at Burg v. Municipal Court, 144 C.A.3d 169, 192 C.R. 531 (1983). However, because the California Supreme Court granted a hearing in this matter, the Court of Appeal decision will not be published in a final bound volume of the official reporters, and cannot be cited as legal authority. California Rules of Court 977(a). The citation is set forth herein as required by U.S.

---

*The citations to the unofficial reports are unavailable at the time of dictating this statement.

Sup. Ct. Rule 15 (d).

JURISDICTION

This is a prohibition proceeding wherein Appellant filed a petition for Writ of Prohibition in the Superior Court of the State of California in the County of Santa Clara. Appellant is seeking a Writ of Prohibition prohibiting the Municipal Court of the State of California, in the County of Santa Clara from proceeding with a criminal prosecution against Appellant based upon an alleged violation of California Vehicle Code § 23152(b). Appellant contends that the subject statute is unconstitutional as being repugnant to the United States Constitution. The Superior Court denied the Petition. The Superior Court's judgment was appealed to the Court of Appeal of the State of

California which held in favor of the statute's validity. This case was further appealed to the California Supreme Court which also rendered a decision in favor of the validity of California Vehicle Code § 23152(b).

The judgment Appellant seeks to have reviewed was entered on December 22, 1983. A rehearing was denied by Order dated January 19, 1984. Appellant filed a Notice of Appeal on March 5, 1984, in the Supreme Court of the State of California. A copy was also mailed to the other courts and persons listed on the affidavit of service in Appendix "G" attached hereto.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

Copies of the Judgment, Order Denying Rehearing and Notice of Appeal are included in the Appendix appended

hereto.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the constitutionality of California Vehicle Code § 23152(b) which provides:

> "It is unlawful for any person who has 0.10 percent of more, by weight, of alcohol in his or her blood to drive a vehicle upon a highway or upon other than a highway in areas which are open to the general public.
>
> "For purposes of this subdivision, percent, by weight, of alcohol shall be based upon grams of alcohol per 100 milliliters of blood."

Appellant contends that California Vehicle Code § 23152(b) is invalid on the grounds that it is repugnant to the due process and equal protection clauses of the United States Constitution which provide:

> "No person shall...be deprived of life, liberty, or property, without due process of law...."

United States Constitution, Amendment V.

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

United States Constitution, Amendment XIV § 1.

STATEMENT OF CASE

On April 21, 1982, a formal complaint was filed against Appellant alleging a violation of California Vehicle Code § 23152(b). Said complaint was filed with the Santa Clara County Municipal Court, the Appellee herein.

On May 18, 1982, Appellant demurred to the Complaint based upon California Vehicle Code § 23152(b) being unconstitutional as violating the due process

clauses of federal and state constitutions by not providing a person of ordinary intelligence notice of a standard of conduct which is forbidden. The demurrer was overruled.

On September 3, 1982, Appellant filed a Petition for a Writ of Prohibition in Superior Court of Santa Clara County based upon the same grounds, and seeking to obtain a decree prohibiting the Municipal Court from proceeding on the above-referenced complaint. Judgment was filed denying the Writ of Prohibition on September 20, 1982.

Appellant filed his Notice of Appeal to the Court of Appeal on October 19, 1982. The Court of Appeal filed its Opinion affirming the trial court's judgment on June 22, 1983. Appellant filed a Petition for Rehearing on July 6, 1983, which was denied by the Court of

Appeal on July 14, 1983. This appeal was based on the same grounds as the original Petition for Writ of Prohibition.

Appellant filed a Petition for a hearing in the California Supreme Court on July 29, 1983. A hearing was granted, and the Court's Judgment entered on December 22, 1983, affirmed the trial court's Judgment. A Petition for a rehearing was denied by order of the Court dated January 19, 1984. The appeal to the California Supreme Court was based on the same grounds raised in the lower courts, and in addition, by way of amicus curiae briefs, oral argument and the Petition for Rehearing, the additional ground of a violation of the equal protection clauses of the federal and state Constitutions was raised.

SUBSTANTIALITY OF FEDERAL QUESTIONS

California Vehicle Code § 23152(b) creates a criminal offense of driving a motor vehicle while having a chemical content of one's blood of one-tenth of one percent of a gram of alcohol per 100 millileters of blood. California is not the only state to have such a statute. At least 24 other states and the District of Columbia have enacted similar statutes. The statutes seem to have been enacted at the urging of Congress which has made the enactment of a law that any person with a blood alcohol content of .10 percent or greater while driving a motor vehicle shall be deemed to be driving while intoxicated a prerequisite to receiving federal highway funds to support alcohol safety programs. 23 U.S.C. § 408(e)(1)(C).

This type of a criminal statute presents substantial constitutional questions.

I. SECTION 23152(b) IS REPUGNANT TO THE DUE PROCESS CLAUSE OF THE CONSTITUTION BECAUSE IT DOES NOT PROVIDE A STANDARD OF CONDUCT FOR THOSE WHOSE ACTIVITIES ARE PROSCRIBED.

Section 23152(b) is a statute the violation of which may subject a person to imprisonment for one year in the county jail, a fine of up to $1,000.00 and a driver's license suspension. California Vehicle Code §§ 13352, 23165.

There is no way that a person can perceive the chemical content of his blood in the minute measurements required by § 23152(b) at or immediately prior to the time of driving a motor vehicle.

This Court has consistently held that the due process clause of the United States Constitution requires that a criminal statute provide a standard of conduct for those whose activities are proscribed by which one can measure one's conduct to determine whether or not one is violating the statute. If it does not, it violates the first essential of due process of law and is unconstitutional. Kolender v. Lawson, ___U.S. ___, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983); Lanzetta v. New Jersey, 306 U.S. 451, 59 S.Ct. 618, 83 L.Ed. 888 (1938); Connelly v. General Construction Company, 269 U.S.385, 46 S.Ct. 126, 70 L.Ed. 322 (1926).

The California Supreme Court's decision holds that a criminal statute need not give sufficient notice so that a person can tell whether or not

he is about to violate a criminal statute immediately before an alleged violation thereof. The California Supreme Court holds that if one drinks a substantial amount of alcohol in a short time, that is sufficient warning not to drive and avoid possible criminal behavior. The Court also relies upon the California Driver's Handbook published in 1982 which contains a chart which the State claims can be used to estimate one's blood alcohol content. The Court indicates that the public can use this chart to obtain sufficient notice of when one's blood alcohol content reaches .10. In fact, the chart is erroneous, and grossly misleading. It indicates that a person weighing 160 pounds can drink four drinks per hour and still have a blood alcohol level below .10. Resort to any secondary

source will establish that if anyone were to follow the 1982 chart, they would die of alcohol poisoning within a matter of hours. I Erwin, Defense of Drunk Driving Cases, (3d ed. 1983) at 15-11. If the public were to follow the 1982 chart, it would be innocently trapped into violating § 23152(b).

Even correctly prepared charts are not accurate or reliable for several reasons: 1. They presume a fixed alcohol content of drinks when in fact, the alcohol content of drinks varies considerably even for the same kind of drink from establishment to establishment. 2. The charts presume a uniform absorption and elimination rate of alcohol to and from one's blood. This presumption is falacious in that these rates vary from person to person and even with the same person depending on

the content of one's digestive system when drinking one's drink, body chemistry, emotions and type of beverage. Moenssens and Inbau, Scientific Evidence in Criminal Cases, Foundation Press 2d ed. (1978)

Having a "substantial" amount of alcohol in a "short" time is not sufficient notice. "Substantial" and "short" mean different things to different people and these words do not provide a definite standard.

To make things even more confusing to the general public California Vehicle Code § 23155 provides that if one has a blood alcohol content of below .05, one is presumed to be not under the influence of alcohol. This statute gives the public notice that it is legal to drink and drive. The Legislature has made no attempt to proscribe driving after con-

suming any amount of alcohol at all.

The California Supreme Court acknowledges that it is "probably true" that it is impossible for a person to determine by means of his senses whether his blood alcohol level is a "legal" .09 or an "illegal" .10. Appellant submits that because of this impossibility, a person of ordinary intelligence cannot ascertain whether he is violating the statute prior to being arrested, and consequently, the statute violates due process of law.

II. SECTION 23152(b) HAS A CHILLING EFFECT ON THE PUBLIC'S EXERCISE OF ITS FUNDAMENTAL RIGHT TO TRAVEL AND CONSEQUENTLY VIOLATES THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION.

Because a person cannot perceive if that person has one-tenth of one percent

of a gram of alcohol per 100 milliliters of blood in his system prior to driving, he doesn't know if he will be violating the law or not. This creates a chilling effect in that people will out of fear of imprisonment not drive when it is actually perfectly legal for them to do so when they have drunk some alcohol, but don't know if their blood alcohol level is below .10 or not.

The automobile is probably the singularly most important and prevalent mode of travel in our country. The right to travel is recognized as a fundamental right. Because of the statute's chilling effect, it is overbroad in effect in that it interferes with the public's lawful travel by automobile. Is there a rational basis for this overbreadth?

The purpose of the law is to curtail drunk driving, not legal driving. This

is adequately proscribed by California Vehicle Code § 23152(a) which provides:

> "It is unlawful for any person who is under the influence of an alcoholic beverage or any drug, or under the combined influence of an alcoholic beverage and any drug, to drive a vehicle."

Appellant submits that there is no rational basis for framing § 23152(b) so as to be overbroad rather than precise.

It is beyond question that a person cannot perceive the minute quantities of alcohol in his blood required by § 23152(b) even if this Court were to hold that § 23152(b) nevertheless gives sufficient notice to meet due process requirements, Appellant submits that the Court must recognize that the statute does at least to some extent compromise the fundamental right to fair notice of what conduct constitutes a crime. Appellant also submits that the funda-

mental right to travel is involved. Not to drive, but to travel, because when the State says that one can legally drive when not under the influence and with a blood alcohol content below .10 and a law's chilling effect prevents a person from doing so, that law interferes with a person's freedom to travel by driving legally.

Because fundamental rights are affected and infringed, the strict scrutiny or compelling State interest test should be applied when examining the constitutionality of § 23152(b) under equal protection standards. Under this standard, there is no presumption of constitutionality which normally attaches to a statute. The burden is on the State to establish that the classification involved is necessary to achieve a compelling State interest,

and if not necessary, or if the State's purpose can be accomplished in a manner less restrictive on the fundamental rights involved, the statute must fall. Shapiro v. Thompson, 394 U.S.618, 89 S.Ct.1322, 22 L.Ed.2d 600 (1969).

Here, the State's interest is to prevent drunk driving. California Vehicle Code § 23152(a) prohibits drunk driving through a standard people can perceive.

Because of the lack of notice which § 23152(b) provides, it acts to prevent people with less than a .10 blood alcohol level from driving when it is perfectly legal for them to do so. Therefore, the law is overbroad in effect, and since its purpose is equally achieved by California Vehicle Code § 23152(a), § 23152(b) is invalid.

Section 23152(b) illegally discrimi-

nates against legally driving persons who drink as a class. It also discriminates against drivers with a .10 blood alcohol level or over who are not under the influence. The authorities indicate that all persons with a .10 blood alcohol level or above are not under the influence. People v. Lachman, 23 C.A.3d 1094, 100 C.R. 710 (1972). Lachman indicates that at a .14 blood alcohol level a person is probably under the influence "depending on objective symptoms." Lachman cites authority that from .05 to .15 blood alcohol levels only some people are under the influence.

California Vehicle Code § 23152(a) accomplishes the State's purpose of prohibiting drunk driving in a less intrusive manner because it only interferes with the public's right to travel to the extent required by the State's

interest in preventing drunk driving.

III. SECTION 23152(b) ALSO VIOLATES THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION BECAUSE IT CREATES TWO CLASSES OF DRIVERS SUBJECT TO PUNISHMENT UNDER THE SAME VEHICLE CODE SECTION AND CREATES DIFFERENT PRECONVICTION BURDENS OF PROOF ON THE TWO CLASSES.

One problem with the statute is that it not only states a crime, it necessarily divides social drinkers who drive into two classifications: one class of drivers with a blood-alcohol content of .10 or above, and another class of drivers with a blood alcohol content of less than .10. Both classes of drivers are at all times

subject to prosecution for violation of § 23152(a)* should they drive a vehicle while under the influence of alcohol. Should any individual from either class of drivers be convicted under § 23152(a) or § 23152(b), he would be sentenced under Vehicle Code §§ 23160 and 23165. However, in order to be sentenced for driving while under the influence of alcohol, the State must prove beyond a reasonable doubt that the individual drove while "under the influence," while allowing that individual to offer exculpatory evidence on that issue.

A conviction under § 23152(b) will result in the same sentence as a conviction for driving while under the influence. (See §§ 23160 and 23165 of the Vehicle Code.) However, because

---

* The driving while under the influence statute.

such a driver is in the classification of drivers with a .10 or more blood alcohol content, it is not necessary for the State to prove, prior to sentencing under § 23160 or § 23165, that driver was, beyond a reasonable doubt, driving while under the influence of alcohol. For those drivers who fall within the .10 or more blood alcohol content classification, they may be sentenced under § 23160 or § 23165 without a showing that they were "under the influence," whereas, the other class of drivers may not be so sentenced without the State being put to its proof on that issue.

There is no reason for the disparate burdens of proof required for sentencing under § 23160 or § 23165 based upon which classification a driver falls under. The purpose of California

Vehicle Code §§ 23160 and 23165 is to punish drivers whose drinking has caused their driving to be dangerous. Regardless of blood alcohol level, there is no reason to treat one class differently in terms of proof of being under the influence than the other. This is so even though one class may be subject to prosecution under §§ 23152(a) and (b), while the other class is subject only to prosectuion under § 23152(a).

Under the present statutory scheme, all drivers, regardless of blood alcohol level, who are guilty of driving while "under the influence" may be prosecuted to conviction under § 23152(a). Only those drivers who are innocent will escape conviction under that code section. Subsection (b) of Vehicle Code § 23152 is, therefore, superfluous to the prosecution and punishment of those

drivers who, in fact, drove while under the influence of alcohol. It is only when the State cannot prove someone under the influence of alcohol while driving that resort to subsection (b) becomes necessary. As to those people, they may be convicted and punished even though they are not under the influence of alcohol while driving because being "under the influence" is not an element of that offense.

The classifications created by Vehicle Code § 23152(b) create different burdens of proof on the issue of driving while under the influence prior to sentencing under § 23160 or § 23165. Where such a fundamental right as the presumption of innocence is involved, the classifications must be justified by a compelling State interest. (Concurring opinion, Cleveland Board of

Education v. LaFleur, 414 U.S. 632, 39 L.Ed.2d 52, 94 S.Ct. 791 (1974); Sandstrom v. Montana, 442 U.S. 510, 61 L.Ed.2d 39, 99 S.Ct. 2450 (1979).) No such compelling interest exists for the classifications created by § 23152(b).

Moreover, there is no nexus between the purpose to be achieved by § 23152(b) and the treating of the .10 or more blood alcohol content drivers differently from the less than .10 blood alcohol content drivers prior to sentencing under § 23160 or § 23165, Baxtrom v. Herold, 383 U.S. 107, 15 L.Ed.2d 620, 625, 86 S.Ct. 760, 762-764 (1966).

Once again, because fundamental rights are involved and because a less burdensome alternative is available to the State, namely prosecution and punishment under California Vehicle Code

§ 23152(a), § 23152(b) is unconstitutional.

IV. SECTION 23152(b) IS AN UNCONSTITUTIONAL CRIMINAL CONCLUSIVE PRESUMPTION OF DRIVING UNDER THE INFLUENCE.

Prior to January 1, 1982, California Vehicle Code § 23126(3) set forth a rebuttable presumption that a person was presumed to be "under the influence of intoxicating liquor" if his blood alcohol level was .10 percent or more by weight of alcohol. When the presumption was invoked, the burden of coming forward with evidence shifted to the defendant, the burden of proof remained the same. The defendant

> "need only raise a reasonable doubt as to the sufficiency of the proof of the ultimate fact."

People v. Schrieber, 45 Cal.App.3d 917, 923, 119 Cal.Rptr. 812 (1975).

On January 1, 1982, the rebuttable presumption was deleted from the Vehicle Code (see §§ 23126 and 23155) and a new provision, § 23152(b), was added.* The purpose of that section is to conclusively presume that a driver with a .10 blood alcohol level is under the influence of alcohol. At page 32, footnote 16, of the Petition for Hearing to the Supreme Court in People v. Alfaro** (a companion case to this one and from which the State incorporated the arguments made in its Petition for Hearing into its argument in this case), the

---

*The rebuttable presumption was reenacted by urgency legislation as Vehicle Code § 23155(a)(3) in February of 1982.

**In People v. Alfaro, § 23152(b) was declared unconstitutional by the Court of Appeal. The California Supreme Court granted a hearing, and then the appeal was dismissed in light of the decision in the instant case.

State argued in pertinent part:

> "Congress has now made enactment of an IPS law with at least a 0.10 BAC level mandatory for any State wishing to receive federal highway funds to support alcohol traffic safety programs. Title 23, U.S.C. § 408(e)(1)(C). If the opinion is allowed to stand, the State of California will lose $4.3 million in such funds in fiscal 1983. [Figures supplied by Craig L. Miller, Regional Program Coordinator, U.S. Department of Transportation, Nat'l Highway Traffic Safety Admin.]." (Original emphasis.)

The federal law referred to mandates enactment of a conclusive presumption, as follows:

> "For purposes of this section, a State is eligible for a basic grant if such State provides -
>
> (C) that any person with a blood alcohol concentration of 0.10 percent or greater when driving a motor vehicle shall be deemed to be driving while intoxicated;" (Title 23 U.S.C. § 408(e)(1)(C).)

Although not addressing the conclusive presumption issue, some sister state Court opinions and one California Court

opinion have acknowledged that their respective statutes are legislative determinations that the stated blood alcohol level makes it dangerous to drive a motor vehicle.

Thus, in Greaves v. State, 528 P.2d 805, 807 (Utah 1974), the Court stated:

> "Inherent in its [the Utah statute's] language is the legislative determination and declaration that the stated blood content of .10 percent of alcohol makes it dangerous for a person to operate ... a vehicle."

In State v. Franco, 96 Wash.2d 816, 639 P.2d (1982), the Court stated:

> "Under the prior DWI statute... the amount of alcohol in a person's blood created certain presumptions as to whether or not a person was under the influence of intoxicants. Under the present statutory scheme, however, the presumptions have been abolished. Instead, the statute sets out alternative methods of committing the crime of driving while under the influence. The statute does not presume, it

> defines. Thus, driving with a 0.1 percent [blood-alcohol content] is one method of committing the crime of driving while under the influence." (Emphasis added.)

(See also People v. Lujan, 141 Cal.App.3d Supp 15, 22 (1983).)

Three Courts which have explicitly dealt with the conclusive presumption issue are Coxe v. State, 281 A.2d 606, 607 (Del. 1971); State v. Abbott, 514 P.2d 355, 357 (Ore. App. 1973); and State v. Gerdes, 252 N.W.2d 335, 336 (S.D. 1977). In all of these sister state opinions, each Court noted that the legislature had determined that it was hazardous or dangerous to drive with the stated blood alcohol level. In Coxe v. State, supra, State v. Abbott, supra, and State v. Gerdes, supra, the Courts held that their respective statutes were not conclusive presumptions,

but rather new crimes. Following this analysis, the California Supreme Court held that Vehicle Code § 23152(b) was not a conclusive presumption of being under the influence of alcohol.

Appellant submits that each Court that has addressed the issue has stopped too soon in its analysis. To say that a criminal statute is not a conclusive presumption because it states "new elements" and is thus a new crime is not dispositive. All true conclusive presumptions state new elements. This is because a conclusive presumption substitutes the foundational fact or facts in place of the presumed fact. Thus, both technically and practically, whenever a conclusive presumption in invoked in the criminal law area, "new elements" of a crime will be stated.

Appellant submits that a further

analysis of Vehicle Code § 23152(b) will confirm that it is a conclusive presumption of being under the influence of alcohol in violation of Due Process of Law.

A general history of blood alcohol levels as they relate to driving in California shows that in 1938, the American Medical Association and the National Safety Council commenced grappling with the problem of at what level of alcohol in the blood is a driver under the influence, Gray, Attorneys Textbook of Medicine (3d ed. 1983) section 133.60. Three categories of blood alcohol content evolved: a blood alcohol content of from 0 to .05 percent constituted prima facie evidence of sobriety; a content from .05 to .15 percent gave rise to no presumption; and a blood alcohol content of .15 percent constituted prima facia

evidence of being under the influence (id.).

In the 1960's, California adcpted by statute its own blood alcohol levels for use in prosecuting drivers charged with driving while under the influence of alcohol. That section, former Vehicle Code § 23126, set forth a rebuttable presumption of being under the influence upon a showing of a blood alcohol content of 0.10 or above. Under that statute, a blood alcohol content of less than .05 constituted prima facie evidence of not being under the influence. By operation of this statute, a defendant who tested at .10 or above

> "need only raise a reasonable doubt as to the sufficiency of the proof of the ultimate fact."

People v. Schreiber, supra, at 26.

In February of 1979, the United

States Department of Transportation produced an issue paper entitled, "Alcohol Countermeasures Illegal Per Se and Preliminary Breath Testing."

> "The issue paper encouraged state legislatures to enact 'illegal per se laws' establishing as a traffic offense, the operation of a motor vehicle with a BAC equal to or in excess of a specified level, typically 0.1 percent."

State v. Franco, 96 Wash.2d 816, 639 P.2d 1320, 1323 (Wash. 1982).

In December 1979, the California Assembly Committee on Criminal Justice conducted hearings in Pomona on several proposed bills, the common concern of which was the impaired driver. Among these were AB 207 (Hart) and AB 7 (Hart), both of which included a ".10 BAC equals impairment" provision. During the hearings, Ventura County Municipal Court Judge Lee Cooper testified in favor of the concept. During his testimony, the

jurist opined:

> "All right. Addressing ourselves firstly to the present law, the law that makes it a crime to drive while under the influence of an intoxicating liquor, within my experience, which is close to 20 years now, I don't think the ordinary citizen understands that law. I don't think the ordinary citizen understands what it means to be under the influence of intoxicating liquor. He comes into your law office, if you're a lawyer, and says, 'I wasn't drunk.' He comes into the court and says, 'Judge, I wasn't drunk.' And he means it. And he does not understand the law. And the ordinary citizen on the street does not understand the law.
>
> I don't think juries understand the law when I sit there on the bench and tell them that this law is violated when a person has consumed sufficient alcohol that he can no longer drive with the caution characteristic of a sober person in the full possession of his faculties under like or similar circumstances or like we used to tell them that a person violates this law when he has consumed sufficient alcohol that his ability to drive is affected to the extent that he can no longer drive like the ordinary, reasonable and prudent person in the full possession of his faculties

under like or similar circumstances. I think that presents sheer confusion to the public in general and to trial juries in particular and, I suspect, to many of my colleagues on the bench and in the practice of law.

The concept of under the influence, while it may or may not have any real meaning as we analyze it, does give rise to no end of litigation."

(Impaired Drivers: By Drugs and Alcohol, Hearings before the Assembly Comm. on Criminal Justice [December 17, 1979] at 3:9-4:13. [Hereafter 1979 hearings].)

Later the jurist was asked a series of questions by Assemblyman Elihu Harris. This exchange occurred:

"ASSEMBLYMAN HARRIS: ...You mentioned the problem or the analysis that if a person is incapacitated or somehow not capable of driving as he would if not drinking that that would be the point at which he's impaired. Since that differs in all persons -- then are you saying that you think .10 is the absolute basement at which everyone who drives is impaired?

"We should set a point in the

> interest of highway safety where we are pretty well persuaded that essentially everyone is affected to the extent that they hadn't ought to be on the road and define it at that. As I say, I don't think that's any different than saying, 'You may not drive faster than 55, regardless of your equipment, regardless of your ability as a driver, you may not in the interest of public safety." (1979 Hearing, supra, at 10:18, 11:14, 15:13-16:1.)

AB 7 was introduced December 1, 1980. In time, it was referred to the Assembly Committee on Criminal Justice, then chaired by Assemblyman Goggin. The bill was reported out of committee and passed the Assembly by a 71-1 vote. The Senate Judiciary Committee then considered it. The bill passed the Senate 24-1. It was delivered to the Governor, with a recommendation by the Legislative Counsel that he approve it. The Governor signed, and it was enacted as Stats. 1981,

c. 939, p. 3560, § 10. As a result, the 0.10 provision was codified as Vehicle Code § 23102.6(a). In the following legislative session, the Vehicle Code was extensively renumbered. Section 23102.6(a) became section 23152(b). Stats. 1982, C. 53, p. 252, § 26.

The legislative history of the phrase "0.10 blood alcohol level" indicates that Vehicle Code § 23152(b) is intended to and does create a conclusive presumption of being under the influence of alcohol. Former Vehicle Code § 23126 created a rebuttable presumption of being "under the influence" based upon a blood alcohol level of .10 or above. Simultaneously upon that code section's deletion from the Vehicle Code, § 23152(b) was enacted. Section 23152(b) was enacted as a subpart of Vehicle Code § 23152, of which subpart (a) is

the statute pertaining to driving under the influence of alcohol. Moreover, under the present statutory scheme, there is no distinction between conviction under §§ 23152(a) or (b) in terms of punishment. Punishment for first and subsequent offenses are the same under either subsection, as are the terms of probation (see Vehicle Code § 23160, et. seq.). Additionally, either subsection may now be used as a prior offense for purposes of sentencing under Vehicle Code § 23165.

The historical correlation between a blood alcohol level of .10 or above with "driving under the influence," the history of California laws referring to a .10 blood alcohol level, and the present statutory scheme pertaining to sentencing drivers "under the influence" under the same statutes as those with a

blood alcohol level of .10 or above, singularly and collectively, compel the conclusion that Vehicle Code § 23152(b) creates a conclusive presumption of being under the influence of alcohol.

Such presumptions are unconstitutional because they presume as fact, without a hearing on the issue, a fact which may not be true in violation of due process of law, Sandstrom v. Montana, 442 U.S. 510, 61 L.Ed.2d 39, 99 S.Ct. 2450 (1979); Cleveland Board of Education v. LaFleur, 414 U.S. 632, 39 L.Ed.2d 52, 94 S.Ct. 79 (1974); City of Santa Barbara v. Adamson, 27 Cal.3d 123, 133, 164 Cal.Rptr. 539, 610 P.2d 436 (1980); Atkisson v. Kern County Housing Authority, 59 Cal.App.3d 89, 98, 130 Cal.Rptr. 375 (1976).

In the instant case, it is not universally, necessarily true that those

who drive with a .10 blood alcohol level are under the influence of alcohol, Gray, Attorneys Textbook of Medicine ___ (3d ed. 1983) at §§ 133.52(4), 133.53 and 133.60; People v. Lachman, 23 Cal. App.3d 1094, 1097, 100 C.R. 710 (1972); State v. Abbott, 514 P.2d 355, 357 (Ore. App. 1973); State v. Clark, 593 P.2d 123, 126 (Ore. 1979).

Moreover, the presumption directly infringes upon the fundamental rights to be presumed innocent of a crime and all of its elements, as well as to offer evidence on one's own behalf in a criminal proceeding, by circumventing the issue of being "under the influence" upon a showing of a blood alcohol level of .10 or above while driving. When fundamental rights are infringed upon by a statute, the compelling State interest test is applied. For the reasons set

forth in sections II and III above, § 23152(b) does not pass muster.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that probable jurisdiction should be noted.

DATED: March 15, 1984.

Perry E. Olsen
Attorney for Appellant

SUPREME COURT
FILED
DEC 22 1983
Laurence P. Gill, Clerk

_____
Deputy

C O P Y

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

RICHARD JOSEPH BURG, Plaintiff and Appellant, vs. THE MUNICIPAL COURT OF THE SANTA CLARA JUDICIAL DISTRICT OF SANTA CLARA COUNTY, Defendant and Respondent; THE PEOPLE, Real Party in Interest and Respondent.	)	Crim. 24622 Super. Ct. No. 507133

Richard Joseph Burg, hereafter defendant, appeals from a judgment denying his petition for a writ of prohibition. He contends that Vehicle Code

section 23152 subdivision (b),[1/] fails to give constitutionally adequate notice of the conduct it prohibits, and that the municipal court erred in overruling his demurrer to that effect. We conclude that section 23152, subdivision (b), is constitutional, and therefore affirm the judgment.

Defendant was arrested at 2:25 in the morning of March 27, 1982, for violation of section 23152, subdivision (a) (driving while under the influence of alcohol). A chemical test administered 50 minutes later revealed a blood alcohol content of 0.23 percent. He was charged with violating section 23152, subdivision (b), i.e., driving a vehicle while having 0.10 percent or more, by weight, of alcohol in one's body. The complaint

---

[1/] All statutory references are to the Vehicle Code unless otherwise indicated.

also alleged a prior conviction of former section 23102, subdivision (a) (driving while under the influence of alcohol).

Defendant demurred on the ground that section 23152, subdivision (b), gives constitutionally inadequate notice of the conduct proscribed. The municipal court overruled his demurrer, and defendant sought a writ of prohibition in the superior court. The petition was denied on the merits, and this appeal followed.[2/]

I. Background

A. The Problem

Eighty years ago an editorialist complained, "Inebriates and moderate drinkers are the most incapable of all persons to drive motor wagons. The general palsy and diminished power of

---

[2/] We note that as of January 1, 1983, appeal is no longer available in these circumstances. (Code Civ. Proc. § 904.1; see generally Gilbert v. Municipal Court (1977) 73 Cal.App.3d 723, 728-736.

control of both the reason and the senses are certain to invite disaster in every attempt to guide such wagons." (26 Q.J. Inebriety (1904) 308, 309.) In the ensuing decades motor vehicles have become faster, heavier, and ubiquitous, with proportionately tragic consequences to the victims of drinking drivers. Nearly half of the traffic deaths in California between 1976-1980 involved drinking drivers. (Cal. Highway Patrol, 1980 Ann.Rep., Fatal & Injury Motor Vehicle Traffic Accidents, p. 2, tables 1a, 1b, and p. 58, tables 6a, 6b.) Nearly one-quarter of all traffic accidents resulting in injury involved the use of alcohol. (id. at p. 3, tables 1c, 1d, and p. 58, tables 6a, 6b.) Traffic deaths in the United States exceed 50,000 annually, and approximately one-half of those fatalities are alcohol-

related. (U.S. Dept. Transp., 1977 Highway Safety Act Rep., Appen. A-9, table A-1; cf. Jones & Joscelyn, Alcohol and Highway Safety 1978: A review of the State of Knowledge (U.S. Dept. of Transp. 1978) pp. 11-26.)

The drunk driver cuts a wide swath of death, pain, grief, and untold physical and emotional injury across the roads of California and the nation. The monstrous proportions of the problem have often been lamented in graphic terms by this court and the United States Supreme Court. (See Taylor v. Superior Court (1979) 24 Cal.3d 890, 898-899) [quoting U.S. Dept. Health, Ed. & Welf., 3d Special Rep. U.S. Cong. on Alcohol and Health (1978)]; South Dakota v. Neville (1983) ___ U.S. ___, ___ [103 S.Ct. 916, 920] [describing the "tragic frequency" of the "carnage caused by drunk drivers"]; Mackey v. Montrym (1979) 443 U.S. 1,

17-18.) As observed in Breithaupt v. Abrum (1957) 352 U.S. 432, "[t]he increasing slaughter on our highways, most of which sould be avoidable, now reaches the astounding figures only heard of on the battlefield." (Id. at p. 439.) Indeed, in the years 1976 to 1980 there were many more injuries to California residents in alcohol-related traffic accidents than were suffered by the entire Union Army during the Civil War, and more were killed than in the bloodiest year of the Vietnam War. (Compare Cal. Highway Patrol, 1980 Ann. Rep., Fatal & Injury Motor Vehicle Traffic Accidents, p. 2, tables 1a, 1b, 1c, 1d, and p. 58, tables 6a, 6b, with Statistical Abstract of U.S. (103d ed. 1982) p. 361, tables 598, 599.) Given this setting, our observation that "[d]runken drivers are extremely dangerous people" (Taylor

v. Superior Court, supra, 24 Cal.3d 890, 899) seems almost to understate the horrific risk posed by those who drink and drive.

B. The Legislative Response

Recognizing the effect of alcohol on drivers, state legislatures early in the century attempted to regulate such conduct. Because "both popular and legal views of the problem centered on the grossly intoxicated driver" (Ross, Deterring the Drinking Driver (1982) p. 2), the laws also reflected that conception. Thus, California's first statute on the topic read simply, "No intoxicated person shall operate or drive a motor vehicle or other vehicle upon any public highway within this state." (Italics added.) (Stats. 1913, ch. 326 § 17, p. 646.)

A more satisfactory means of defining the problem of drinking and driving

emerged in the middle decades of this century, with the development of scientific measurement of blood-alcohol levels. (Ross, Deterring the Drinking Driver (1982) p. 2; Cameron, The Impact of Drinking-Driving Countermeasures: A Review and Evaluation 1979 Contemp. Drug Prob. 495, 497-498.) Research on alcohol's effect on both motor skills and judgment revealed that impairment occurred at alcohol concentrations as low as 0.05 percent (Hurst, Estimating the Effectiveness of Blood Alcohol Limits (1970) 1 Behav. Research Highway Safety 87), considerably below the point at which typical clinical symptoms of intoxication appear in most persons. (Ross, Deterring the Drinking Driver (1982) p. 2; Jones & Joscelyn, Alcohol and Highway Safety 1978, op. cit. supra, at pp. 35-50.) Thus in 1969, after a

number of intervening amendments that attempted to refine definitions and specified penalties, California's "driving under the influence" statute (former § 23102) was fortified by the addition of former section 23126, which created a presumption of being under the influence if a driver had 0.10 percent or more by weight of alcohol in his blood. (Stats. 1969, ch. 231, § 1, p. 565.) By 1972, 47 states had similar statutes. (Murray & Aitken, The Constitutionality of California's Under-the-Influence-of-Alcohol Presumption (1972) 45 So.Cal.L. Rev. 955, 958, fn. 8.)

Even these laws, which considerably assisted the prosecution of "driving under the influence" cases, proved inadequate in many respects. Under them, the ultimate question was defined in terms of the defendant's subjective behavior and

condition: "Was the defendant under the influence at the time he drove?" Celerity and certainty of punishment were frustrated by the ambiguity of the legal criteria; no matter what his blood-alcohol level, a defendant could escape conviction merely by raising a doubt as to his intoxication. (People v. Lachman (1972) 23 Cal.App.3d 1094, 1097; People v. Schrieber (1975) 45 Cal.App.3d 917, 923; Cameron, The Impact of Drinking-Driving Countermeasures: A Review and Evaluation 1979 Contemp. Drug. Prob. 495, 510-511.)

In response to this continuing problem, in the past decade most states enacted additional legislation supplementing existing "driving under the influence" statutes and fashioned after what has been termed the "Scandinavian model." (Ross, Deterring the Drinking

Driver (1982) pp. 21-70; Ross, The Scandinavian Myth: The Effectiveness of Drinking-and-Driving Legislation in Sweden and Norway (1975) 4 J. Legal Stud. 285; Snortum, Alcohol Impaired Driving in Norway and Sweden: Another Look at "The Scandinavian Myth" (forthcoming) (Issue 1, 1984) 6 Law & Pol'y Q. ___; Snortum, Controlling the Alcohol-Impaired Driver in Scandinavia and the U.S.: Simple Deterrence and Beyond (forthcoming) (Issue 2, 1984) 12 J.Crim. Just.___; Votey, Scandinavian Drinking-Driving Control: Myth or Intuition? (1982) 11 J. Legal Stud. 93.) These statutes--which are most frequently subdivisions of a general "drinking and alcohol" statute--define the substantive offense not by the subjective term "driving under the influence," but instead as the act of driving with a

specified blood alcohol level. (Macdonald & Wagner, Rep., Nat. Study of Preliminary Breath Test (PTB) and Illegal per se Laws (U.S. Dept. of Transp. 1981) (Executive Summary) p. xv.) Under these laws, proof of being "under the influence" is unnecessary. The statutes represent a legislative determination that public safety is endangered when a person drives a motor vehicle while having a specified percentage (typically 0.10) or more by weight of alcohol in his blood.

II. Section 23152, Subdivision (b)

As noted, former section 23102 made it illegal to drive while under the influence of alcohol. Conviction required a showing that alcohol had "so far affected the nervous system, the brain, or muscles as to impair to an appreciable degree the ability to

operate a vehicle in a manner like that of an ordinarily prudent and cautious person in full possession of his faculties." (Italics deleted.) (Byrd v. Municipal Court (1981) 125 Cal.App.3d 1054, 1058.) As explained above, prosecution under this section was facilitated by former section 23126, which established a presumption that a person with a blood alcohol level of 0.10 or more was under the influence of alcohol. (People v. Schrieber, supra, 45 Cal.App.3d 917, 923.)

In an attempt to address the continuing threat to public safety posed by drinking drivers, in 1981 the Legislature retained the "driving under the influence" statute, renumbered it section 23152, subdivision (a), and added the statute at issue here, section 23152, subdivision (b), which provides: "It is

unlawful for any person who has 0.10 percent or more, by weight, of alcohol in his or her blood to drive a vehicle. [¶] For purposes of this subdivision, percent, by weight, of alcohol, shall be based upon grams of alcohol per 100 milliliters of blood."

At the urgings of Congress, [3] statutes of this kind have recently been enacted in 28 states and the District of Columbia. Depending on the statutory scheme, these enactments create either a new offense,[4] or an alternative definition of "driving under the influence,"[5]

---

[3] 23 U.S.C.A. section 408 (e)(1)(C) (making enactment of a 0.10 percent blood alcohol law mandatory for any state wishing to receive federal highway funds to support alcohol traffic safety programs).

[4] Alabama (Ala.Code, tit. 32-5A-191 (a)(1)); Arizona (Ariz.Rev.Stats.Ann., § 28-692 (B)); Arkansas (Ark.Stat. § 75-2503 (b)); Connecticut (Conn.Gen. (fn. cont.)

(fn. 4 cont.)

Stats.Ann., § 14-227a(g)); Colorado (Colo.Rev.Stats., tit. 42-4-1202 (1.5) (a) (0.15 percent)); Florida (Fla.Stats. Ann., § 316.028 (3)); Illinois (Ill.Rev. Stat., ch. 95 1/2, § 11-501 (1)); Iowa (Iowa Code Ann., § 321.281 (1)(b) (0.13 percent)); Maine (Me.Rev.Stats., tit. 29, § 1312-13 (1B), (2C)); Michigan (Mich. Stat.Ann., § 9.2325 (2)); Missouri (Mo. Rev.Stats., § 577.012 (1)); Nebraska (Rev.Stats.Neb., § 39.699.07; North Dakota (Cent.Code N.D. § 39-08-01(1)(a) & (2)(a); Oklahoma (Okla.Stat.Ann., tit. 47, § 11-902 (A)(1)); Pennsylvania (Pa. Stats.Ann., § 3731 (a)(4)); South Dakota (S.D. Codified Laws, § 32-23-1 (1)); Utah (Utah Code Ann., § 41-6-44(1) (0.08 percent)); Vermont (Vt. Stats.Ann., tit. 23, § 1201 (a)(1)); Wisconsin (Wis.Stats. Ann., § 346.63 (1)(b)); District of Columbia (D.C. Code, § 40-716 (b)(1)).

5/ Alaska (Alaska Stats., § 28.35.030 (a)); Delaware (Del.Code Ann., tit. 21, § 4176 (a)); New York (N.Y.Stats., Veh. & Traffic, § 1192 (2)); Oregon (Ore.Rev. Stats., §§ 487.540, 487.545 (0.08 percent)); Rhode Island (Gen.Laws. R.I., § 31-27-2(b)); Texas (Tex.Rev.Civ.Stat. Ann., art. 67011-1 (2)(b)); Washington (Rev. Code Wash.Ann., § 46.61.502 (1)).

or a lesser included offense within driving under the influence. [6] Our statute establishes a new and separate offense. (Wallace v. Municipal Court (1983) 140 Cal.App.3d 100, 108; McKinley, Proving a Violation of Vehicle Code Section 23152(b): Rabbit Tracks in the Snow or Russian Roulette? (1982) 5 Crim.Just.J. 223, 224; Comment, Driving with 0.10 % Blood Alcohol: Can the State Prove It? (1982) 16 U.S.F.L.Rev. 817, 817.)

Contrary to assertions by amici curiae, some commentators, [7] and one

---

[6] North Carolina (Gen.Stats.N.C., § 20.138 (b).) In West Virginia, although driving with 0.10 percent blood alcohol is not itself a crime, it is basis for mandatory license revocation if the defendant is also convicted of driving while intoxicated. (W.Va.Code, § 17c-5A-1.)

[7] E.g., Scherotter, California Vehicle Code Section 23152 (b): A Guessing (fn cont.)

court,[8] section 23152, subdivision (b), does not create a conclusive presumption of intoxication, nor does it "eliminate[ ] the prosecutor's burden of proof when the accused is found to have [0.10] percent, by weight, of alcohol in [his] blood."[9] Instead, the statute defines, in precise terms, the conduct proscribed. In other states that have enacted a statute similar to section 23152, subdivision (b), the courts have drawn the same conclusion, notably the Washington Supreme Court which declared, "The Statute does not presume, it defines." (State v. Franco

---

(fn. 7 cont.)
Game for California Drivers (1982) 5 Crim.Just.J. 249, 257-261.

8/ People v. Lujan (1983) 141 Cal.App.3d Supp. 15, 22.

9/ Review of Selected 1981 California Legislation (1982) 13 Pacific L.J. 785, 795.

(Wash. 1982) 639 P.2d 1320, 1323; see also State v. Abbott (Ore.App. 1973) 514 P.2d 355, 357 [question is not whether defendant is intoxicated, but whether he had the specified level of alcohol in his blood]; State v. Gerdes (S.D. 1977) 252 N.W.2d 335, 335-336 [by proscribing driving with 0.10 percent blood alcohol, the legislature is "stating an offense"]; cf. People v. Dillon (1983) 34 Cal.3d 441, 472-476 [Pen. Code § 189 does not presume malice, it defines first degree felony murder as an offense in which malice is not an element].)

Although under section 23152, subdivision (b), it is no longer necessary to prove that the defendant was in fact under the influence, the People still must prove beyond a reasonable doubt that at the time he was driving his blood alcohol exceeded 0.10 percent. (People

v. Lujan, supra, 141 Cal.App.3d Supp. 15, 22 [the People must prove beyond a reasonable doubt that the defendant was driving a vehicle in any area open to the public, and his blood-alcohol level was 0.10 percent or more at the time of the alleged offense]; accord, Greaves v. State (Utah 1974) 528 P.2d 805, 807-808; Coxe v. State (Del. 1971) 281 A.2d 606, 607; State v. Gerdes, supra, 252 N.W.2d 335, 336; Van Brunt v. State (Alaska App. 1982) 646 P.2d 872, 873; cf. State v. Basinger (N.C.App. 1976) 226 S.E.2d 216, 219.)[10/]

[10/] Section 23152, subdivision (b), prohibits driving a vehicle with a blood-alcohol level of 0.10 percent or higher; it does not prohibit driving a vehicle when a subsequent test shows a level of 0.10 percent or more. Circumstantial evidence will generally be necessary to establish the requisite blood-alcohol level called for by the statute. A test for the proportion of alcohol in the blood will, obviously, be the usual type (fn. cont.)

(fn 10 cont.)

of circumstantial evidence, but of course the test is not conclusive: the defendant remains free to challenge the accuracy of the test result, the manner in which it was administered, and by whom. (People v. Lewis (1983) 148 Cal. App.3d 614 620; accord, Fuenning v. Superior Court (Ariz. (1983) ____ P.2d ____, ____ (Dec. 15, 1983, No. 17049-SA)* [rejecting argument that analogous statute represents "substitution of a machine test result for a jury verdict" because defendant is given an opportunity to challenge accuracy of test result, and state must prove beyond a reasonable doubt that defendant's blood-alcohol level was 0.10 percent at the time he was driving]; Cooley v. Municipality of Anchorage (Alaska App. 1982) 649 P.2d 251, 254-255.) Of course, both parties may also adduce other circumstantial evidence tending to establish that the defendant did or did not have a 0.10 percent blood-alcohol level while driving. (See, e.g., Fuenning, id., at pp. ____-____.**

We also observe that the present case represents a facial attack on the statute following overruling of a demurrer. We therefore need not consider to what extent in particular cases fundamental notions of due process would permit a defendant to show, for example, that he did not knowingly or voluntarily drive or consume alcohol.

* Typed opinion at page 9.

** Typed opinion at pages 15-16.

III. Constitutional Issues

A. Police Power

We have previously observed that "the area of driving is particularly appropriate for extensive legislative regulation, and that the state's traditionally broad police power authority to enact any measure which reasonably relates to public health or safety operates with full force in this domain." (Hernandez v. Department of Motor Vehicles (1981) 30 Cal.3d 70, 74; accord, Escobedo v. State of California (1950) 35 Cal.2d 870, 876 ["usage of the highways is subject to reasonable regulation for the public good"]; Watson v. Division of Motor Vehicles (1931) 212 Cal. 279, 283 [legislative power to regulate travel over highways for general welfare is extensive, and may be exercised in any reasonable manner]; Mackey v. Montrym,

supra, 443 U.S. 1, 17 [state has great leeway in adopting summary procedures to protect public health and safety from drunk drivers]; State v. Melcher (Wn.App. 1982) 655 P.2d 1169, 1170 [all presumptions favor legislation that promotes public health and safety and is rationally related to regulation of drinking drivers]; cf. Hale v. Morgan (1978) 22 Cal.3d 388, 398.)

"The wisdom of the legislation is not at issue in analyzing its constitutionality, and neither the availability of less drastic remedial alternatives nor the legislative failure to solve all related ills at once will invalidate a statute." (Hale v. Morgan, supra, at p. 398.) Surely the regulation of drinking drivers in a state that experienced 338,344 arrests for "drunk driv-

ing in 1982[11/] is well within the legitimate police power of the Legislature. (Accord, State v. Franco, supra, 639 P.2d 1320, 1324 [upholding legislation analogous to § 23152, subd. (b)]; Greaves v. State, supra, 528 P.2d 805, 807 [same]; Roberts v. State (Fla. 1976) 329 So.2d 296, 297 [same]; State v. Basinger (N.C.App. 1976) 226 S.E.2d 216, 218-219 [same].) Scientific evidence and sad experience demonstrate that any driver with 0.10 percent blood alcohol is a threat to the safety of the public and

---

11/ Criminal Justice Profile (Cal. Dept. Justice 1982) 58. Indeed, this figure significantly underreports the pervasiveness of the problem. Studies have estimated drinking drivers' risk of apprehension to be between 1 in 2,000 (e.g., Borkenstein, Problems of Enforcement, Adjudication and Sanctioning, in Proceedings of the Sixth Internat. Conf. on Alcohol, Drugs & Traffic Safety (Isrealstam & Lambert, edits. 1975) at pp. 655, 660) and 1 in 200. (Beitel et al., Probability of Arrest While Driving Under the Influence of Alcohol (1975) 36 J. Stud. Alcohol 109, 114.)

to himself. (Gray, Attorney's Textbook of Medicine (3d ed. 1983) ¶¶ 133.52-133.52(3) [all individuals suffer impairment at 0.10 percent blood-alcohol content]; State v. Franco, supra, 639 P.2d 1320, 1322 [abundant scientific evidence that at 0.10 percent blood alcohol all persons are significantly affected and will have lost at least one-quarter of their normal driving ability]; People v. Lewis (1983) 148 Cal.App.3d 614, 617; People v. Schrieber (1975) 45 Cal.App.3d 917, 924; People v. Lachman (1972) 23 Cal.App.3d 1094, 1098; People v. Perkins (1981) 126 Cal.App.3d Supp. 12, 21; Greaves v. State, supra, 528 P.2d 805, 807; Coxe v. State (Del. 1971) 281 A.2d 606, 607; Oversight into the Administration of State and Local Court Adjudication of Driving While Intoxicated: Hearings Before Subcom. on

Courts] [statement of Dr. Roger P. Maickel, noting that typically vision impairment begins at 0.03-0.08 percent blood alcohol and becomes significant in all subjects at 0.10 percent; reaction-time impairment begins at 0.04 percent; judgment of distance, dimensions and speed at 0.08 percent; coordination and memory at 0.10 percent].) Section 23152, subdivision (b), represents a legislative determination to that effect. (Accord, Greaves v. State, supra, 528 P.2d 805, 807; Coxe v. State, supra, 281 A.2d 606, 607; State v. Gerdes, supra, 253 N.W.2d 335, 335-336; State v. Clark (Ore. 1979) 593 P.2d 123, 126; State v. Basinger, supra, (N.C.App. 1976) 226 S.E.2d 216, 218; People v. Fox (N.Y.Just. Ct. 1976) 382 N.Y.S.2d 921, 925-926; cf. Erickson v. Municipality of Anchorage (Alaska App. 1983) 662 P.2d 963,

969-970, fn. 3.) Indeed, the available scientific information would support an even lower figure. (Hurst, Estimating the Effectiveness of Blood Alcohol Limits (1970) 1 Behav. Research Highway Safety 87; Ross, Deterring the Drinking Driver (1982) pp. 2-3; Jones & Joscelyn, Alcohol and Highway Safety 1978, op. cit. supra, pp. 35-50; Hearings Before Subcom. on Courts, supra, pp. 99-101; Gray, Attorney's Textbook of Medicine (3d ed. 1983) ¶¶ 133.52-133.52 (3).) At least two states and several foreign countries have established standards between 0.05 percent and 0.08 percent.12/ We have no

---

12/ (Utah Code Ann., §41-6-44(1) (0.08 percent); Ore.Rev.Stats. §§ 487.540, 487.545 (0.08 percent). The foreign countries and their respective blood alcohol levels are: Australia (0.05) (Victoria); Austria (0.08); Canada (0.08); France (0.08); Germany (0.08); Great Britain (0.08); The Netherlands (0.05/ 0.08) (combination of tests); Norway (0.05); Sweden (0.05). The level in New Zealand is 0.10. (fn. cont.)

difficulty concluding that the 0.10 percent figure fixed by section 23152, subdivision (b), is rationally related to exercise of the state's legitimate police power. (Roberts v. State, supra, 329 S.2d 296, 297.)

B. Void for Vagueness

Five of our sister states have addressed claims of unconstitutional

(fn. 12 cont.)
Ross, Deterring the Drinking Driver (1982) pp. 20-70; Cameron, The Impact of Drinking-Driving Countermeasures: A Review and Evaluation (1979) Contemp. Drug Prob. 495, 512-519; see generally, Ross et al., Deterrence of Drinking and Driving in France: An Evaluation of the Law of July 12, 1978 (1982) 16 Law & Soc'y Rev. 345; Ross, Law, Science and Accidents: The British Road Safety Act of 1967 (1973) 2 J. Legal Stud. 1; Votey, Scandinavian Drinking-Driving Control: Myth or Intuition? (1982) 11 J. Legal Stud. 93; Votey, Control of Drunken Driving Accidents in Norway: An Econometric Evaluation of Behavior Under Uncertainty (1983) 11 J.Crim.Just. 153; Snortum, Controlling the Alcohol-Impaired Driver in Scandinavia and the U.S.: Simple Deterrence and Beyond (forthcoming) (Issue 2, 1984) 12 J. Crim. Just. ___.)

indefiniteness with respect to analogous 0.10 percent statutes, and all have found the contentions meritless. (Fuenning v. Superior Court (Ariz. 1983) ____ P.2d ___, ___ (Dec. 15, 1983, No. 17049-SA)* Van Brunt v. State (Alaska App. 1982) 646 P.2d 872, 873; State v. Franco, supra, (Wash. 1982) 639 P.2d 1320, 1324; Roberts v. State, supra, (Fla. 1976) 329 So.2d 296, 297; Greaves v. State, supra (Utah 1974) 528 P.2d 805, 807-808; cf. State v. Pickering (Me. 1983) 462 A.2d 1151, 1160.)[13/]

13/ Other states have also addressed and unanimously rejected challenges to similar statutes on the grounds, inter alia, of equal protection (e.g., State v. Watts (Mo. 1980) 601 S.W.2d 617, 621; State v. Gerdes (S.D. 1977) 252 N.W.2d 335, 336), unconstitutional presumption of intoxication (e.g., State v. Abbott (Ore.App. 1973) 514 P.2d 355, 357 [former 0.15 percent law]), and failure to require actual knowledge of the condition proscribed (Van Brunt v. State (Alaska App. 1982) 646 P.2d 872, 873).

* Typed opinion at page 14.

Additionally, a Court of Appeal and two superior court appellate departments have determined the precise issue adversely to defendant's view. (People v. Lewis, supra, 148 Cal.App.3d 614, 617-619; People v. Lujan, supra, 141 Cal.App.3d Supp. 15, 20-26; People v. Woodard (1983) 143 Cal.App.3d Supp. 1, 4.)[14/] Defendant asserts, however, that we should not be persuaded by these decisions, because they fail to sufficiently analyze the issues and justify the results. We proceed to review defendant's claim that section 23152,

---

14/ In a related context an appellate department held that the 0.10 percent presumption of intoxication applicable to section 23152, subdivision (a), cases (former § 23126, subd. (a)(3), present § 23155, subd. (a)(3)) is not unconstitutionally indefinite. (People v. Perkins (1981) 126 Cal.App.3d Supp. 12, 21 [summarily dismissing claim as "totally without merit"].)

subdivision (b), is void for vagueness.

Both article I, section 13, of the California Constitution and the Fourteenth Amendment to the United States Constitution declare that no person shall be deprived of life, liberty or property without due process of law. It has been recognized for over 80 years that due process requires inter alia some level of definiteness in criminal statutes. (Note, Due Process Requirements of Definiteness in Statutes (1948) 62 Harv.L.Rev. 77, 77, fn. 2.) Today it is established that due process requires a statute to be definite enough to provide (1) a standard of conduct for those whose activities are proscribed and (2) a standard for police enforcement and for ascertainment of guilt. (Connally v. General Const. Co. (1926) 269 U.S. 385, 391; Lanzetta v. New Jersey (1939)

306 U.S. 451, 453; People v. Mirmirani (1981) 30 Cal.3d 375, 382, and cases cited; People v. Superior Court (Engert) (1982) 31 Cal.3d 797, 801; Note, The Void-for-Vagueness Doctrine in the Supreme Court (1960) 109 U.Pa.L.Rev. 67-96; Note, Due Process Requirements of Definiteness in Statutes (1948) 62 Harv.L.Rev. 77 passim.)[15/]

15/ The United States Supreme Court recently observed that "[a]lthough the [void-for-vagueness] doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of vagueness doctrine is not actual notice, but the other principal element of the doctrine--the requirement that a legislature establish minimal guidelines to govern law enforcement." (Kolender v. Lawson (1983) ___ U.S. ___, ___ [103 S.Ct. 1855, 1858], citing Smith v. Goguen (1974) 415 U.S. 566, 574; see also LaFave & Scott, Criminal Law (1972) § 11,p. 87.) We observe, however, that due process has never been interpreted so strictly as to require the "actual" notice to which Kolender and Smith refer; at most,the cases require "fair notice." (E.g., Smith, supra, 415 U.S.

(fn. cont.)

To begin with the second component, the statute could not be more precise as a standard for law enforcement. (Freund, The Use of Indefinite Terms in Statutes (1921) 30 Yale L.J. 437, 437.) It gives no discretion whatever to the police, and thus is not susceptible of arbitrary enforcement. (Pryor v. Municipal Court (1979) 25 Cal.3d 238, 252.)

(fn. 15 cont.)
at p. 572, fn. 8 ["fair notice"]; Colautti v. Franklin (1979) 439 U.S. 379, 390 ["fair notice," citing United States v. Harriss (1954) 347 U.S. 612, 617]; Rose v. Locke (1975) 423 U.S. 48, 49 ["fair warning"]; see also McBoyle v. United States (1931) 283 U.S. 25, 27, in which Justice Holmes observed, "[a]lthough it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.") In the context of this case we find it unnecessary to address the question whether the notice requirement is, or should be, subordinate to the interest in establishing guidelines for law enforcement.

Indeed, the very precision of the standard assures the statute's validity in this respect. (Cf. Note, The Void-for-Vagueness Doctrine in the Supreme Court (1960) 109 U.Pa.L.Rev. 67, 90-91.)

Turning now to the "fair notice" component of the void-for-vagueness doctrine, we observe that the real thrust of defendant's argument is that the statute is in effect "void for preciseness." His complaint is not that the language of the statute is vague or ambiguous, but that it is too exact. His novel theory is that the statute fails to notify potential violators of the condition it proscribes because it is impossible for a person to determine by means of his senses whether his blood-alcohol level is a "legal" 0.09 percent or an "illegal" 0.10 percent. The latter observation is probably true as

a matter of fact, but it does not affect the constitutionality of the statute.

Defendant's theory would render the void-for-vagueness doctrine internally inconsistent: the notice requirement would compete with the need to provide precise standards for law enforcement. When, as in the present case, a statutory standard requires scientific measurement, the very factor that assures due process under the "standards" component would violate due process under the "notice" component. 16/

It is apparently defendant's contentention that due process requires notice that is subjectively verifiable,

---

16/ Additionally, if we were to choose to follow the United States Supreme Court's suggestion that the notice consideration is subordinate to the interest in providing precise standards for law enforcement, defendant's theory would require that the lesser rationale prevail over the greater.

according to the terms of the statute, at the instant before the alleged violation. He claims the statute is invalid because it is impossible for ordinary persons actually to know when their blood alcohol reaches the proscribed point. No court, however, has interpreted the notice requirement so strictly;[17/] indeed, such a view would invalidate many other criminal laws, violation of which depends on an after-the-fact determination by a judge or jury as to the defendant's state of mind or the reasonableness of his behavior. (E.g., Nash v. United States (1913) 229 U.S. 373, 377; Note, Due Process Requirements of Definiteness in Statutes (1948) 62 Harv.L.Rev. 77, 79.)

17/ Due process requires only "fair notice," not "actual notice." (See fn. 15, ante.)

"Fair notice" requires only that a violation be described with a "'reasonable degree of certainty'" (People v. Mirmirani, supra, 30 Cal.3d 375, 382) so that "ordinary people can understand what conduct is prohibited." (Kolender v. Lawson (1983) ____ U.S. ___, ___ [103 S.Ct. 1855, 1858].) The notice provided must be such that prosecution does not "trap the innocent" without "fair warning." (Grayned v. City of Rockford (1972) 408 U.S. 104, 108.)

One who drives a vehicle after having ingested sufficient alcohol to approach or exceed the level proscribed is neither "innocent" within the meaning of Grayned, nor is he without "fair warning." His behavior is not "innocent" because one who drives with a blood-alcohol content above 0.05 percent is in jeopardy of violating section 23152,

subdivision (a), i.e., driving while under the influence. (§ 23155, subd. (a)(2).) Indeed, in a number of states such a driver would be prima facie impaired well before he reached 0.10 percent.[18/] It is difficult to sympathize with an "unsuspecting" defendant who did not know if he could take a last sip without crossing the line, but who decided to do so anyway.

The very fact that he has consumed a quantity of alcohol should notify a person of ordinary intelligence that he is in jeopardy of violating the statute. Accord, Fuenning v. Superior Court, supra, ___ P.2d ___, ___* ["it requires

---

18/ (E.g., N.Y.Stats., Veh. & Traffic, § 1195(c) (blood alcohol between 0.07 and 0.10 is "prima facie impairment"); Mich.Stat.Ann., § 9.2325(1)(3)(b) [presumption of impairment if blood alcohol is between 0.07 and 0.10 percent].)

* Typed opinion at pages 12-13.

more than a small amount of alcohol to produce a .10% BAC [blood-alcohol content]. Those who drink a substantial amount of alcohol within a relatively short period of time are given a clear warning that to avoid possible criminal behavior they must refrain from driving." (Fn. omitted.)]; cf. People v. Perkins, supra, 126 Cal.App.3d Supp. 12, 21.) Although this factor alone sustains our determination that the statute provides adequate warning to potential violators, we find some further support in this regard from the existence for over 15 years of an analogous "0.10 percent" rebuttable presumption of being under the influence of alcohol pursuant to section 23155 and its predecessor, section 23126.[19/] Considering also

---

19/ As observed by one commentator, [l]ong and successful administration of (fn. cont.)

today's heightened level of public awareness regarding the problem, we cannot believe that any person who drives after drinking would be unaware of the possibility that his blood-alcohol level might equal or exceed the statutory standard. (Greaves v. State, supra, 528 P.2d 805, 808; LaFave & Scott, Criminal Law (1972) § 11, p. 86, text and cases cited in fns. 28-29; Note, The Void-for-Vagueness Doctrine in the Supreme Court (1960) 109 U.Pa.L.Rev.

(fn. 19 cont.)
a statute establishes patterns of social conduct to which interested parties may have become adjusted. The pattern of conduct may, of course, result eventually in the development of a commonly understood meaning of the stautory term." (Note, Due Process Requirements of Definiteness in Statutes (1948) 62 Harv.L.Rev. 77, 83.) Although, as noted above, the two subdivisions of section 23152 are substantively different, for purposes of vagueness analysis the 0.10 percent figures employed directly in subdivision (b) and indirectly in subdivision (a) are analogous.

67, 87, fn. 99.) If, in the exceptional case, a person experiencing the symptoms of alcohol ingestion[20/] failed to be aware of them, the most probable reason would be depression of the brain function caused by the alcohol itself. "Fair notice," however, has not been interpreted as requiring the overcoming of such a self-induced obstacle. (Cf. Williford v. State (Alaska App. 1982) 653 P.2d 339, 342; Morgan v. Municipality of Anchorage (Alaska App. 1982) 643 P.2d 691, 692.)

Furthermore, a statute "'"will be upheld if its terms may be made reasonably certain by reference to other definable sources."'" (County of Nevada v. MacMillen (1974) 11 Cal.3d

---

20/ See Meonssens & Inbau, Scientific Evidence in Criminal Cases (2d ed. 1978) pages 73-74.

662, 673, and cases cited.) Charts are readily available to the public that show with reasonable certainty the number of different alcoholic beverages necessary for a particular individual to reach a blood-alcohol level of 0.10 percent. For example, the 1982 California Driver's Handbook, issued by the Department of Motor Vehicles and available in English and five foreign languages free of charge to any driver, contained a blood alcohol estimation chart on the inside of its front cover, together with the admonition: "Keep this booklet in the glove compartment of your vehicle. It will help you many times." (Cal. Driver's Handbook (Cal. Dept. Motor Veh. 1982) p. 2.) The current handbook contains a significant discussion of the 0.10 percent law, and concludes with the highlighted admonition that "[t]he

average size person (160) pounds can reach a .10 BAC [blood-alcohol content] with as few as three or four average drinks (or beers) in one hour." (Cal. Driver's Handbook (Cal. Dept. Motor Veh. 1983) p. 40.) Although it is true that even with use of a chart a person may err in his estimate and thereby violate the statute, this fact does not render the statute invalid. "[T]he law is full of instances where a man's fate depends on his estimating rightly . . . some matter of degree." (Nash v. United States, supra, 229 U.S. 373, 377.) We are aware of none that has been declared unconstitutional for that reason.

We decline to frustrate the Legislature's clear and legitimate purpose in enacting the statute involved here. (People v. Vis (1966) 243 Cal.App.2d 549, 555, and cases cited; cf. Winters

v. New York (1948) 333 U.S. 507, 535 [dis. opin. of Frankfurter, J.].) We conclude that under both the federal and state Constitutions, section 23152, subdivision (b), provides adequate notice of the conduct proscribed, and is not void for vagueness. (Grayned v. City of Rockford, supra, 408 U.S. 104, 108; People v. Mirmirani, supra, 30 Cal. 3d 375, 383.)[21/]

IV. Prior Convictions

Defendant has also been charged

21/ We also reject the contentions of amici curiae that section 23152, subdivision (b), constitutes an impermissible discrimination against "those adult drivers who consume alcohol," or that it has an impermissible "chilling effect" on the right to travel. Equally untenable are assertions that the statute "invests the police with unlimited discretion to randomly stop and detain drivers," or that it somehow denies equal protection of the laws, or that it is invalid because mixed drinks from different bartenders may contain different amounts of alcohol."

with a prior conviction under former section 23102, subdivision (a) (driving while under the influence of alcohol), apparently for the purpose of enhancing penalty under sections 23165 and 23170. He denied this allegation, rather than demurring to it; but because the issue is of great importance and statewide concern, we nevertheless observe in closing that the propriety of such a charge was addressed and correctly resolved in favor of treating the prior violations as enhancements in People v. Lujan, supra, 141 Cal.App.3d Supp. 15, 29-31.

The judgment is affirmed.

MOSK, J.

WE CONCUR:

BIRD, C.J.
KAUS, J.
BROUSSARD, J.
REYNOSO, J.
GRODIN, J.
* WEINSTEIN, J.

* Assigned by the Chairman of the Judicial Council.

CERTIFIED FOR PUBLICATION

COPY

IN THE COURT OF APPEAL OF THE

STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION THREE

RICHARD JOSEPH BURG,

Plaintiff and Appellant,

v.

THE MUNICIPAL COURT FOR THE SANTA CLARA JUDICIAL DISTRICT OF SANTA CLARA COUNTY,

Defendant and Respondent;

THE PEOPLE OF THE STATE OF CALIFORNIA,

Real Party in Interest and Respondent.

F I L E D
Jun 22 1983
Court of Appeal - First Dist.
CLIFFORD C. PORTER, Clerk
By _____ Deputy

A019853

(Super. Ct. No. 507133)

I. SUMMARY

We hold that Vehicle Code section

23152, subdivision (b),[1] which declares it unlawful for a person to drive if he or she has 0.10 percent or more of alcohol in his or her blood, is not vague and is therefore constitutional, valid, and enforceable.[2]

II. STATEMENT OF THE CASE

A detailed history of the case is not pertinent to the issue on appeal. Appellant was charged by complaint with violation of Vehicle Code section 23152, subdivision (b). It was alleged that he had suffered a prior conviction for driving under the influence of alcohol (former § 23102, subd. (a)). He pled not

---

1. All statutory citations are to the Vehicle Code unless otherwise indicated.

2. We are aware of People v. Alfaro (June 2, 1983, No. A019583 Cal. App. 3d , in which Division One of this court declared section 23152, subdivision (b), unconstitutional. We find the (fn cont.)

guilty and denied the prior. He also demurred to the complaint on the ground that the statute was unconstitutional because of vagueness. The municipal court overruled the demurrer. Appellant sought a writ of prohibition in the superior court, challenging the propriety of the lower court's ruling. The writ was denied on the merits without a hearing. This appeal followed.[3/]

(fn 2 cont.)
dissenting opinion of Justice Elkington persuasive.

3. We note that this appeal arrived at this court through a procedural "'loophole'" which has since been closed. (See Code Civ. Proc., §904.1, as amended effective Jan. 1, 1983; see generally Gilbert v. Municipal Court (1977) 73 Cal. App.3d 723, 728-736.) In light of the extraordinary importance of the issue presented, we do not fault counsel for using this procedure. (See Mendieta v. Municipal Court (1980) 109 Cal.App. 3d 290.)

III. DISCUSSION

A. Background

Former section 23102 declared it unlawful for any person to drive who was under the influence of alcohol. (This offense is commonly referred to as DUI [driving under the influence] or DWI [driving while intoxicated].) A DUI conviction required a showing that alcohol had ". . . so far affected the nervous system, the brain, or muscles as to impair to an appreciable degree the ability to operate a vehicle in a manner like that of an ordinarily prudent and cautious person in full possession of his [or her] faculties. [Citations.]" (Byrd v. Municipal Court (1981) 125 Cal.App.3d 1054, 1058, emphasis omitted.) Former section 23126 established a rebuttable presumption that a person having a blood alcohol level (BA) of 0.10 or more was

under the influence of alcohol.

These and other related statutes were inadequate to end the slaughter on our highways caused by the drinking driver -- a tragedy repeatedly lamented by the United States Supreme Court (South Dakota v. Neville (1983) _____U.S.____, _____[103 S.Ct. 916, 920; 74 L.Ed.2d 748, 755]), as well as by our own Supreme Court (e.g., Taylor v. Superior Court (1979) 24 Cal.3d 890, 898-899.

In 1981, in an apparent attempt to reduce the carnage, our Legislature retained the DUI statutes, but added section 23152, subdivision (b), which provides: "It is unlawful for any person who has 0.10 percent or more, by weight, of alcohol in his or her blood to drive a vehicle upon a highway or upon other than a highway in areas which are open to the general public.

[¶] For purposes of this subdivision, percent, by weight, of alcohol shall be based upon grams of alcohol per 100 milliliters of blood."

Statutes of this kind, sometimes referred to as "'illegal per se laws,'" have been enacted in a number of states. (See State v. Franco (Wash. 1982) 639 P. 2d 1320, 1322.) Whether such enactment creates a new offense, a lesser included offense in DUI, or an alternative method of committing DUI depends on the statutory scheme. (Ibid.) Our statute created a new and separate offense. (Wallace v. Municipal Court (1983) 140 Cal. App.3d 100, 108, hg. den., May 18, 1983.) Hereafter we shall refer to this offense as "D-10," and to section 23152, subdivision (b), as the "D-10 statute."

We note that the D-10 statute has been referred to as creating a "con-

clusive presumption" of intoxication. (People v. Lujan (1983) 141 Cal.App.3d Supp. 15, 22, pamp. No. 12, emphasis omitted.) This is incorrect. D-10 is a crime regardless of intoxication. The Oregon Court of Appeals, in upholding that state's illegal per se .15 percent statute, explained: "While common sense indicates that it is unlikely that a person with a .15 per cent or more blood alcohol is unintoxicated, . . . it is entirely possible that he may appear to be free of all or most of the usual indicia of intoxication. Thus, there would be reason under such evidence to find him not guilty of a [DUI] charge. Under the state's police power, it is not unreasonable that the legislature should nevertheless make it illegal for all people to drive who have such a concentration of alcohol in their blood. We see no con-

clusive presumption of intoxication in such a prohibition because the question is not whether they are intoxicated, but whether they have .15 per cent or more of alcohol in their blood." (State v. Abbott (Or.App. 1973) 514 P.2d 355, 357.) The Washington Supreme Court expressed the concept succinctly: "The statute does not presume, it defines." (State v. Franco, supra, 639 P.2d at p. 1323.)

B. Vagueness

"Both the California Constitution, article I, section 13, and the Constitution of the United States, Fourteenth Amendment, provide that no person shall be deprived of life, liberty, or property without due process of law. Due process means that 'No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be in-

formed as to what the State commands or forbids.' [Citations.]

"The standard to be applied is set forth in Connally v. General Const. Co. [1926], 269 U.S. 385, 391 . . .: 'That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part render them liable to its penalties is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settle rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men [or women] of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.'" (Katzev v. County of Los Angeles (1959) 52 Cal.2d 360, 370.)

"A statute must be definite enough to provide a standard of conduct for those whose activities are proscribed as well as a standard for the ascertainment of guilt by the courts called upon to apply it. [Citations.]" (People v. Mc Caughan (1957) 49 Cal.2d 409, 414.)

D-10 is an explicitly defined crime; the statute could not be clearer in its creation of the standard of conduct for drinking drivers and the standard to be applied by trial courts. (See People v. Campos (1982) 138 Cal.App.3d Supp. 1, pamp. No. 3, regarding the effect of margin of error in BA measurement.) Appellant's argument is that the D-10 statute is vague in the sense that it is impossible for a person to perceive through his or her senses whether his or her BA is precisely .09 or .10, and therefore to determine whe-

ther he or she is in violation. While this obviously true, it does not render the statute constitutionally infirm.

Similar arguments attacking obscenity statutes have been rejected consistently for reasons which apply, by analogy, to the case at bench. " . . . [L]ack of precision is not itself offensive to the requirements of due process. ' . . .[T]he Constitution does not require impossible standards'; all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices . . . .' [Citation.] . . . ' . . . <u>That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a</u>

criminal offense . . . .' [Citations.]" (Roth v. United States (1957) 354 U.S. 476, 491-492, fn. omitted.)

A statute "'". . . will not generally be held invalid if the language is sufficient to enable the attorney to explain to his client and advise what questions may be left to the determination of the jury, so that he will be able to govern himself accordingly;. . ."'" (Eckl v. Davis (1975) 51 Cal.App.3d 831, 849.) "'" . . . [W]here the statute involves some matters of degree as to which individuals and even jurors might reasonably disagree in their judgment, the statute will not for that reason alone be invalidated, . . ." [Citation.]" (Id., at p. 850.)

We hold that the D-10 statute conveys to the drinking driver a sufficiently definite warning of what conduct is

proscribed. "We can see no reason why a person of ordinary intelligence would have any difficulty in understanding that if he has drunk anything containing alcohol, and particularly any substantial amount thereof, he should not attempt to drive or take control of a motor vehicle." (Greaves v. State (Utah 1974) 528 P.2d 805, 808.)

Furthermore, a statute "'". . . will be upheld if its terms may be made reasonably certain by reference to other definable sources."' [Citations.]" (County of Nevada v. MacMillen (1974) 11 Cal.3d 662, 673.) Charts are readily available which show the number of alcoholic beverages necessary to reach the BA of 0.10. For example, the August 1982 California Driver's Handbook, issued by the Department of Motor Vehicles, and available in English and five foreign

languages free of charge to any driver, contains a "Blood Alcohol Estimation Chart" on the inside of its front cover, together with the admonition: "Keep this booklet in the glove compartment of your vehicle. It will help you many times." (Cal. Driver's Handbook (Cal.Dept. of Motor Vehicles, pamp. Aug. 1982), p. 2.)

Also, we take judicial notice of the fact that since passage of the D-10 statute, numerous articles have appeared in publications of general circulation containing such charts, often with accompanying articles explaining their significance. (E.g., How You Can Drink Safely During the Holidays, San Francisco Chronicle, Dec. 17, 1982, p. 51.)

"Thus, although one can legally drink and drive [citation], our . . . law makes it perfectly clear that the two activities cannot be mixed to the

extent that the drinking affects the driving, or the driver has a 0.1 percent of alcohol in his blood. No further specificity is required if the statute gives fair warning of prohibited conduct. [Citation.]" (State v. Franco, supra, 639 P.2d at p. 1324.)

It is true that a drinking driver may, even with use of an available chart, err in his or her estimation of BA and thereby "innocently" commit a D-10 violation. "'. . .[B]ut "the law is full of instances where a [person's] fate depends on his [or her] estimating rightly . . . some matter of degree." [Citation.]'" (County of Nevada v. MacMillen, supra, 11 Cal.3d at p. 673; see also People v. Daniel (1959) 168 Cal.App.2d Supp. 788, 799-800.) This fact does not render such laws unconstitutional.

A number of penal statutes require

some sort of measurement on the part of the prospective violator. (E.g., Pen. Code, §§ 172 [sale of liquor within specified distances of certain institutions], 374d [animal carcass within 100 feet of street], 597u [requirements in killing a dog or cat by use of carbon monoxide gas], 597x [as above, by use of nitrogen gas]; Health & Saf. Code, §11056 [controlled substances]; Veh. Code, §§ 21201 [bicycle size and equipment], 21707 [fire areas], 21752 [when driving on left prohibited].) We are aware of none which has been declared constitutionally vague for that reason.

Finally, it is now virtually universally accepted that a person with a BA of 0.10 should not be driving. (See, e.g., State v. Franco, supra, 639 P.2d at p. 1322; People v. Lachman (1972) 23 Cal.App.3d 1094, 1098.) In creating the

D-10 offense, the Legislature recognized this fact. "'Where a statute contains a reasonably adequate disclosure of the legislative intent regarding an evil to be combatted in language giving fair notice of the practices to be avoided, a court will be slow to say that such a statute is too indefinite to be enforced. The complexities of the social problems dealt with by the Legislature require that a practical construction be given to the language employed by the [drafters] of legislation lest their purposes be too easily nullified by overrefined inquiries into the meaning of words. "Reasonable certainty, in view of the conditions, is all that is required, and liberal effect is always to be given to the legislative intent when possible." [Citation.]' [Citations.]" (People v. Vis (1966) 243 Cal.App.2d 549, 555.)

IV. CONCLUSION

Drinking of alcoholic beverages is an accepted and pervasive practice in our society; the privilege of driving a personal automobile at one's pleasure is so engrained in our system of mores that any attempt to curtail it is bound to meet with strong resistance. Hence for years the drinking driver has been tolerated, with the result that we have slaughtered more people on the road than have died in all our wars.[4/] The creation of the D-10 offense reflects the desire of the duly elected representatives of the People of this state to end this needless waste of life. This court finds that the statute is reasonably certain in view of the conditions which it attempts to alleviate.

---

4. South Dakota v. Neville, supra, ___ U.S. at p. ___ [103 S.Ct. at p. 920; 74 L. Ed.2d at p. 755.)

We therefore uphold the constitutionality of section 23152, subdivision (b).

The judgment is affirmed.

CERTIFIED FOR PUBLICATION

Barry-Deal, J.

We concur:

Scott, Acting P.J.

Feinberg, J.

IN THE MUNICIPAL COURT

FOR THE SANTA CLARA COUNTY

JUDICIAL DISTRICT

COUNTY OF SANTA CLARA,

STATE OF CALIFORNIA

ROBERT M. FOLEY, MUNICIPAL JUDGE

DEPARTMENT NO. 23

---o0o---

THE PEOPLE OF THE STATE OF CALIFORNIA,	)
Plaintiff,	)No. D8229755
vs.	)M(1)VC23152B
RICHARD JOSEPH BURG,	)
Defendant.	)

---o0o---

HEARING ON DEMURRER

Santa Clara, California, May 18, 1982,

2:00 p.m.

APPENDIX C

THE COURT: The Court is of the opinion of this new Vehicle Code section is basically a strict liability offense. Those are not unknown in criminal law. Just in reviewing the moving papers, I happen to think of 25662, selling to a minor, and knowledge of the age of the person, whether you have it or not isn't a defense. It's just a strict liability offense. You sell to a minor, you're guilty.

[Argument of Counsel]

THE COURT: Well, I don't think that the ruling of this court is going to end this matter. As I understand, there are similar demurrers, motions, et cetera, being brought throughout the courts in the state. I'm satisfied that the statute is a strict liability statute, and it's not unconstitutional, and the Court being satisfied, the demurrer shall be overruled.

IN THE

SUPREME COURT OF THE

STATE OF CALIFORNIA

S. F. No. 24622

RICHARD JOSEPH BURG, Plaintiff and Appellant, VS. THE MUNICIPAL COURT FOR THE SANTA CLARA JUDICIAL DISTRICT OF SANTA CLARA COUNTY, Defendant and Respondent; THE PEOPLE, Real Party in Interest and Respondent.	)	Appeal County Santa Clara Superior Court No. 507133

The above-entitled cause having been heretofore fully argued, and submitted,

It Is Ordered, Adjudged, and Decreed by the Court that the judgment of the Superior Court of the County of Santa Clara in the above-entitled cause, is hereby affirmed.

I, LAURENCE P. GILL, Clerk of the Supreme Court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above-entitled cause on the 22nd day of December, 1983.

WITNESS my hand and the seal of the Court, this 23rd day of January, 1984.

SEAL

LAURENCE P. GILL
Clerk
R. C. MATTEOLI

By _____
Deputy

ORDER DUE

January 20, 1984

ORDER DENYING REHEARING

S.F. No. 24622

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

IN BANK

SUPREME COURT
F I L E D
JAN 19 1984
LAURENCE B. GILL,
Clerk

Deputy

BURG,
Plaintiff and Appellant,

v.

THE MUNICIPAL COURT FOR THE
SANTA CLARA JUDICIAL DISTRICT
OF SANTA CLARA COUNTY,
Defendant and Respondent;

PEOPLE,
Real Party in Interest
and Respondent

Appellant's petition for rehearing DENIED.

/s/ Bird
Chief Justice

APPENDIX E

IN THE SUPREME COURT

OF THE

STATE OF CALIFORNIA

RICHARD JOSEPH BURG, Plaintiff and Appellant, v. THE MUNICIPAL COURT FOR THE SANTA CLARA JUDICIAL DISTRICT OF SANTA CLARA COUNTY, Defendant and Respondent; THE PEOPLE, Real Party in Interest and Respondent.	Crim. 24622 Super. Ct. No. 507133 SUPREME COURT F I L E D Mar 5 1984 Laurence P. Gill, Clerk _____ Deputy

NOTICE OF APPEAL

TO THE SUPREME COURT

OF THE UNITED STATES

Notice is hereby given that Plaintiff and Appellant, Richard Joseph Burg, appeals from the judgment of the Supreme Court of the State of California

entered on January 19, 1984, to the Supreme Court of the United States pursuant to Title 28 United States Code §1257, subdivision (2).

DATE: MAR 2 1984

/s/ Perry E. Olsen

PERRY E. OLSEN
Attorney for Richard Joseph Burg, Appellant
406 Main Street, Suite 224
Watsonville, California 95076
Telephone: (408) 722-2763

CASE NO.

IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 1983

RICHARD JOSEPH BURG, Appellant,

v.

THE MUNICIPAL COURT FOR THE SANTA CLARA JUDICIAL DISTRICT OF SANTA CLARA COUNTY, and THE PEOPLE OF THE STATE OF CALIFORNIA, Appellees

AFFIDAVIT OF SERVICE OF NOTICE OF APPEAL

I, Meredith Ortiz, am not an attorney who is a member of the Bar of this Court representing a party on whose behalf this service is made. I am over eighteen (18) years of age and not a party to the above entitled proceeding. I hereby swear that on March 2, 1984, I served copies of the foregoing Notice of Appeal to the Supreme Court of the United States in the manner set forth below, and further state that all parties required

to be served with said document have been so served:

1. On the People of the State of California by mailing copies in duly addressed envelopes, with first-class postage prepaid, to their attorneys of record, as follows:

John Van de Kamp, Esq.
Attorney General of the State of California
6000 State Building
San Francisco, California 94102;
and

Leo Himmelsbach, Esq.
Santa Clara District Attorney
70 West Hedding Street
San Jose, California 95110

2. On the Municipal Court for the Santa Clara Judicial District of Santa Clara County by mailing a copy to the clerk thereof in a duly addressed envelope, with first-class postage prepaid, as follows:

Ms. Pat Tralonga
Clerk Administrator
Santa Clara County Municipal Court
1095 Homestead
Santa Clara, CA 95050

3. On the Clerk of the Superior Court of the State of California, County of Santa Clara, by mailing copies in a duly addressed envelope with first-class postage prepaid as follows:

CLERK OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
For Delivery to the Honorable Bruce F. Allen
191 North First Street
San Jose, CA 95113

4. On the Court of Appeal of the State of California by mailing a copy in a duly-addressed envelope with first-class postage prepaid as follows:

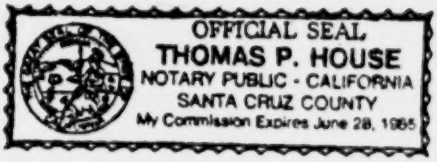
COURT OF APPEAL OF THE STATE OF CALIFORNIA
First Appellate District, State Building, Room 4154
455 Golden Gate Avenue
San Francisco, CA 94102

DATED: March 15, 1984

Meredith Ortiz
Meredith Ortiz

Subscribed and sworn to before me this 15th day of March, 1984.

Thomas P. House
Notary Public



CASE NO.

IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 1983

RICHARD JOSEPH BURG, Appellant,

v.

THE MUNICIPAL COURT FOR THE SANTA CLARA JUDICIAL DISTRICT OF SANTA CLARA COUNTY, and THE PEOPLE OF THE STATE OF CALIFORNIA, Appellees

---

AFFIDAVIT OF SERVICE
OF
JURISDICTIONAL STATEMENT
AND
ENTRY OF APPEARANCE

I, Meredith Ortiz, am not an attorney who is a member of the Bar of this Court representing a party on whose behalf this service is made. I am over eighteen (18) years of age and not a party to the above entitled proceeding. I hereby swear that on March 19, 1984, I served copies of the foregoing JURISDICTIONAL STATEMENT and ENTRY OF APPEARANCE

in the manner set forth below, and further state that all parties required to be served with said document have been so served:

1. On the People of the State of California by mailing three (3) copies in duly addressed envelopes, with first class postage prepaid, to their attorneys of record, as follows:

John Van de Kamp, Esq.
Attorney General of the State of California
6000 State Building
San Francisco, California 94102;

and

Leo Himmelsbach, Esq.
Santa Clara District Attorney
70 West Hedding Street
San Jose, California 95110

2. On the Municipal Court for the Santa Clara Judicial District of Santa Clara County by mailing three (3) copies to the clerk thereof in a duly addressed envelope, with first-class postage pre-

paid, as follows:

Ms. Pat Tralonga
Clerk Administrator
Santa Clara County Municipal Court
1095 Homestead
Santa Clara, California 95050

3. On the Clerk of the Superior Court of the State of California, County of Santa Clara, by mailing three (3) copies in a duly addressed envelope with first-class postage prepaid as follow:

CLERK OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
For Delivery to the Honorable Bruce F. Allen
191 North First Street
San Jose, California 95113

4. On the Court of Appeal of the State of California by mailing three (3) copies in a duly addressed envelope with first-class postage prepaid as follows:

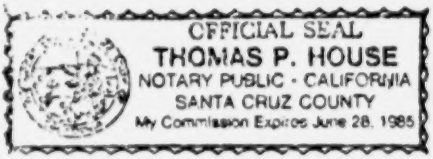
COURT OF APPEAL OF THE STATE OF CALIFORNIA
First Appellate District, State Building, Room 4154
455 Golden Gate Avenue
San Francisco, California 94102

DATED: March 19, 1984

/s/ Meredith Ortiz
Meredith Ortiz

Subscribed and sworn to before me this 19th day of March, 1984.

THOMAS P. HOUSE
Notary Public



END OF DOCKET